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**Supreme Court of the United States**  
**OCTOBER TERM 1942**

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**No. 861**  
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**LEWIS W. GILBERT,**

*Petitioner,*

*vs.*

**GENERAL MOTORS CORPORATION,**

*Respondent.*

\_\_\_\_\_  
**REPLY BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**  
\_\_\_\_\_

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## REPLY BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

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### PART ONE

#### Certain Statements Refuted

#### I

Counsel correctly asserts that the primary issue in a copying case is one of fact, but that statement is subject to the limita-

tion that a finding of fact, made without evidence to support it, presents a question of law. On page 2 it is asserted that this question was answered in the negative by both Courts in the following language:

“The Buick switch has nothing in common with that of Gilbert except use of vacuum control and a mechanical connection to the accelerator. These features are entirely different in construction and function in the Buick device and that of Gilbert.”

But the first sentence of this statement is palpably erroneous. There is a third factor common to plaintiff and Buick, and not found in Collins. This is the central helical spring (two in Buick) to bring the contacts together (in plaintiff's device) and to bring the contacts into the same plane (in Buick). Without this neither device would function. It is not necessary to argue about this. The competing devices have been handed up to the Court (Exhibits 3, 4 and 7, plaintiff's device No. 4 having a window cut in the side, and Exhibits 39 and 40, defendant's device). Exhibit 39 as used on the trial, and submitted on the appeal, was not cut open far enough for the Court to see these springs. Since this apparently misled the Courts into making the statement quoted, we enlarged the cut in No. 39 to show these springs—to this Court. It is not a debatable question. Either those springs are there or they are not. All this Court needs to do is to look in the window of Exhibit 39 and see for itself.

And the finding of the Patent Office, resulting in the interference, becomes important here. If the elements of the count of the interference, set out in the ninth paragraph of the complaint (R 4) were taken away from either of the competing devices (Exhibits 3 and 39) we believe that neither would function. Again we shall not argue this. This Court is quite competent to form its own opinion by the most casual inspection of the two devices.

## II

Counsel quotes, as conclusive of something, the writer's statements appearing on pages 68 and 72 of the Record, to the effect that plaintiff must prove priority as against the world. These statements were erroneous (*Dupont de Nemours v. Masland*, 244 U. S. 100, *supra*) and were promptly corrected by defense counsel (R 70) who correctly stated the true rule, that the invention submitted needs only be novel as between the parties.

## III

Counsel next attacks the question of a confidential submission, claiming (a) that the evidence does not justify the findings of both Courts below as to what was submitted, and (b) that such evidence was insufficient on which to predicate a confidential relation. As to (a) the Courts below found with the petitioner, and respondent has so far acquiesced as to stipulate (R 585, 852) that Exhibit 7, now in this Court's hands, is a replica of the device Watkins brought to Rochester. This would seem to make this finding immune from the attack made on it on pages 3 and 4. The contention as to (b) would seem to be an attempt to reopen the question settled by this Court when it refused in *Hoeltke v. Kemp*, 80 Fed. 2nd 912, *supra*, not only to grant certiorari (298 U. S. 673) but also to listen to the pleas of the four largest motor companies, including the defendant to intervene and file a brief (298 U. S. 673).

## IV

Respondent again reasserts (pp. 6, 7) that the two devices are unlike, and again quotes the erroneous or defective finding of the Courts below. Iteration is not argument. But the statement on page 6, italicized, is that vacuum does not pull



the contacts apart in defendant's switch. Dyer, defendant's designer, who it is claimed devised defendant's switch, swears to the exact contrary on page 395, that is that the movement of the rod attached to the diaphragm helps break the contact. Of course, it would have to, or it would not be there.

Counsel's statement does not credit this Court with intelligence. It is the equivalent of saying that a transport plane from Washington to Pittsburgh carries passengers, but does not carry the engine nor the pilot, because they are together an integral part of the machinery.

In both devices (plaintiff's and defendant's) there are the following obvious points of similarity.

1. Both are totally enclosed, hollow or partly hollow, cylindrical metal containers.
2. In each there is a central helical spring which expands to bring the electrical contacts together.
3. In each there is a tube connected to the intake manifold of the engine.
4. In each the suction of the vacuum, operating through this tube, separates the contacts when the engine starts.
5. In each there is a wire or rod, connected to one of the parts which holds one of the contact points.
6. In each this wire or rod is connected to the accelerator pedal.
7. In each the function of this wire or rod is controlled by the accelerator pedal.
8. In each the function of this wire or rod is to prevent the points coming together when the vacuum falls.

Plaintiff's was the first switch submitted to defendant which contained all these elements. We concede that Dyer learned

something about Collins perhaps earlier than plaintiff's submission on September 10, 1931, though Dyer is quite indefinite about it (R 637). In other words, we believe Exhibit A 12 (ibid) to be genuine. But Collins had no central helical spring, as opposed to the action of the vacuum, but relied on gravity alone, a feature plaintiff had used in his patented switch in 1924 (R 572, 862, 863) but had discarded because of its unreliability (R 863). However, Dyer's drawing of September 10, 1931, which defendant stresses and to which the Court below refers (R 865) and which is found at page 640 of the record, owes nothing to Collins, for the Collins device (application 500947, R 703) was a vacuum controlled device, and Dyer's, as disclosed in the September 10, 1931 drawing referred to, (R 640) and in the two drawings following it (A 15, R 641, A 16, R 642) are *not vacuum controlled devices* (Dyer R 356, 357). He had not caught on to the idea, but on September 29, 1931 (Exhibit A 17, R 643, which is defendant's Skekinah, its Ark of the Covenant) he *had* caught on to the idea. *Where did he get it?* He disclaims invention in himself, and Collins could not lend him what Collins did not have.

Kauffman, says the defendant (brief pp. 13 and 14) and the Courts below argue without analysis (R 866). Kauffman, it is asserted, went to see defendant's vice-president Wilson on the Friday before Labor Day 1931, having a counterpart of defendant's Exhibit D 7 with him (R 459). He does not know whether he left it or not (R 460). But nothing came of this interview, so Kauffman went back again to Wilson *late in September 1931* (R 460) and Wilson arranged for him to see a man named Hunt (ibid). This he did on October 16, 1931. Hunt then wrote to Prescott, Dyer's superior at Anderson, Indiana, enclosing Kauffman's material, with opinion (letter Exhibit D 5, R 738). The blue prints were sent to Dayton, examined and forgotten. When Kauffman had the temerity to ask their return *three years later*, he was told by Hunt in writing *that he had submitted nothing new and that defendant had*

*derived no benefit from the submission.* (Letter Hunt to Kauffman R 740). It is evident that the information disclosed by the so-called submission to Wilson on the Friday before Labor Day (September 4, 1931) never reached Dyer at Anderson at all, and that he knew nothing of Kauffman until Hunt's letter of October 16, 1931 reached Prescott. *Otherwise, Dyer would have said so.* He does not, anywhere. Wilson could have said so, had it been the fact that he communicated the results of this interview to anybody at Anderson. He was not called.

This would seem to eliminate Collins, Kauffman and Dyer as originators or collaborators in the Buick switch, leaving only plaintiff as its source. True, Dyer denies this, but his uncorroborated denial does not meet the requirements of the law. (*Hoeltke v. Kemp*, 80 Fed. 2nd, 912, 923 *supra* cert. den. 298 U. S. 673).\*

We have no wish to quarrel with poor Kauffman, who seems to have been rather shabbily treated, but his testimony must be read in the light of the extraordinary document defendant compelled him to sign (R 562, see folio 1691 R 564) and of his frank admission on the witness stand (R 495).

## V

We are accused of misleading the Court (Brief pp. 9, 10) as to which of defendant's switches was involved in interference 68678. Our statements are taken from defendant's own evidence.

The Laboratory reports tell the story. Exhibit A-41, which defendant asserts is a drawing of A-58 bears the number "Ex.

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\*NOTE—Kauffman and Collins were locked in *three* interferences, one earlier and two later than the Gilbert, Dyer, Lachappelle one which was 68678 (R 746, 748, 749, 751, 752, 754). It is apparent that the Patent Office found some essential similarity between Kauffman and Collins, and another and different similarity between Gilbert, Dyer and Lachappelle.

62322" in the lower right-hand corner (R 654), so does Exhibit A-42 (R 655). But "Ex. 62322" is "Ex. 10184" (R 663, fol. 1987), and the laboratory report (A-52, R 622) says, at folios 1986 and 1987, that this control switch "also latches so that it will not close again unless the throttle is closed." And on page 664, the laboratory reports on Dyer's redesigned switch. "The angular movement required to close this switch was made less on the new switch than it was on the old, in order to cut down the throttle opening when cranking (less than 1/3 open for new switch)—*otherwise the switches were the same.*"

And Dyer says the same thing. He says that Exhibit 53 (R 664) just quoted, is the laboratory report on A-58 as installed on Dawson's Oakland (fol. 1137, R 379, fol. 1133). It had already been tested on Mr. Wikle's car and the laboratory report is quite complete as to its operation (Ex. A-49, R 659, 660, fol. 1980). The "Note" there discloses that vacuum is also needed to pull the tangs apart.

And Dyer further says that A-59, A-58 and A-62 are substantially alike (R 373, fol. 1119) except that one uses a compression spring and the other a torque spring. After this, and slight other changes were made (Dyer R 375-377) development stopped.

Furthermore, respondent seems to contradict itself here. The commercial Buick switch (Exhibits 39, 40, A-62) is said (brief p. 9) to be a development of A-17, et seq (R 643, 644, 645, 646, 647, 648, 652) and that the one in the interference is a mysterious A-58, represented by drawings A-41 to A-47. If that were so, neither A-17 nor the working drawings which follow it, and enumerated above, would have been offered in evidence in interference 68678, as they all were. The notary's signature is on all of them.

However, the issue here is one of *copying*. It antedates the declaration of the interference, and the same claim would exist if nobody had filed in the Patent Office. The submission by Watkins to Findley at Rochester, New York, on September 10, 1931, was in confidence, and created a trust relationship. The appearance of defendant's device embodying all of plaintiff's ideas, called for an explanation from the defendant to disprove the charge of copying. This proof has taken the form of (a) an uncorroborated denial by Dyer and (b) the production of a fatherless device substantially different in form, but substantially accomplishing the same result and performing the same functions in substantially the same way (*Union Paper Bag Machine Co. v. Murphy*, 97 U. S. 120, 125).

## VI

We doubt that we have misunderstood the effect of the Patent Office controversy. Its result would be to award some kind of a patent to Lachappelle, but respondent denies using Lachappelle's features (brief p. 16). However, respondent admits first learning of Lachappelle in 1934 (Answer R 16, 18). This was after the present cause of action accrued.

## PART TWO

### **The Importance of a Proper Construction of Rule 36a**

1. Respondent contends that the question is moot, and that even if the "Requests" are to be taken as admissions, plaintiff must still fail. We doubt that respondent can stand on this assertion, for the Court of Appeals had held to the contrary (R 869). This is a ruling on a question of law, and like other rulings in questions of law, can be attacked on review only on an appeal by the aggrieved party.

2. But the correct interpretation of this Rule is of great practical importance, far transcending, in this Court, the rights and wrongs of individual litigants. The rule is in every day use in the District Courts, and the evil which will result from confusion over it can hardly be overstated, even though it is a procedural requirement. But on procedural requirements often hang the rights of parties in District Courts. We speak from actual experience. A single example may suffice. Section 26 of Title II of the National Prohibition Act (41 Stat. 415, now Title 27, Section 40, U. S. C.) contained the following provision:

“When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any Court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, *and unless good cause to the contrary is shown by the owner*, shall order a sale by public auction of the property seized.”

This was interpreted as a procedural requirement, because the offending vehicle might be forfeited anyway under R S

3450, this section was unnecessary to provide a forfeiture. The District Courts differed about its construction, in view of the apparently alternative remedies open to the government (See cases cited in Title 27, U. S. C. A., p. 191 et seq.) An authoritative determination from this Court was sought and had in *Port Gardner Investment Co. v. U. S.*, 272 U. S. 564, and *United States v. One Ford Coupe*, 272 U. S. 321. In the *Port Gardner* case, this Court held that the procedure outlined in section 26 was mandatory.

Under the law thus settled the procedure was simplified. On the conviction of the driver, the Court, from the bench, would order the car forfeited and sold. There was no pretense of notifying the owner. He was not asked to show cause why his car should not be forfeited. Half of the time the enforcement officers did not know who he was, and at none of the time did they care, unless he could be implicated as *particeps criminis*. If the owner wanted to avoid the forfeiture, he must appear on the day of the trial of the driver and show his innocence. He was not entitled to notice (*U. S. v. Certain Quantity of Intoxicating Liquor*, 291 F. 717). Under this construction of the procedural provision of this section 26, containing the *unless* clause, literally thousands of forfeitures were decreed from the bench, without opinion. That the burden was on the owner to come forward was generally recognized, not only by all District Judges but by Appellate Courts, even by the distinguished jurist who wrote the opinion for the Circuit Court of Appeals in the case at bar (*The Harbour Trader*, 42 F. (2nd) 858, *supra*).

The point is that the District Judges have been taught that the sentence referred to in section 26, containing the "unless" clause, is mandatory and self executing. The present decision is to the exact contrary of this. How can there be harmony of opinion?

3. Plaintiff's "Requests" in this case, with proof of service, were offered and received without objection. They were offered as evidence, as admissions of the facts toward which the inquiries were directed, and stipulated as such (R 851). They are now, in effect, bodily stricken from the record on the ground that no proper foundation was laid for them (R 870). But if no proper foundation had been laid for their reception, was it not the duty of defendant-respondent to object there and then on that ground, and obtain a ruling from the Trial Court, so that, if they were excluded, the plaintiff might bring forward other evidence to supply their place? Our investigation has disclosed no case where an Appellate Court has been held justified in striking evidence received without objection, and this ruling is in direct conflict with Rule XI of the Court which rendered the decision.

### **Objections to Evidence in the Record**

"In all cases of equity or admiralty jurisdiction, heard in this Court, no objection shall be allowed to be taken to the admissibility of any testimony, deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the Court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

Rule XI, Rules of the United States Circuit Court of Appeals, Second Circuit.

Under the guise of denying appellee's motion *ad diminundo*, the Court has in effect granted it (R 870). It has usurped the power of the Trial Court to rule primarily on the admission of evidence. It has, in effect, added to the record responses which were not before the Court below. It has stricken out material evidence received by consent, and



decided the case without it. All this under the guise of interpreting Rule 36a, and placing upon it a construction it will not bear.

Respectfully submitted,

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